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Excerpts From Court Opinions on Revocation of Passport on Security Grounds

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WASHINGTON, June 29 — Following are excerpts from today's Supreme Court decision upholding, by a vote of 7 to 2, a President's right to revoke a passport on national security grounds. The majority opinion was delivered by Chief Justice Warren E. Burger. The minority opinion was by Associate Justice William J. Brennan Jr., with whom Associate Justice Thurgood Marshall joined.

From Majority Opinion

By Chief Justice Burger

The question presented is whether the President, acting through the Secretary of State, has authority to revoke a passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or foreign policy of the United States.

Philip Agee, an American citizen, currently resides in West Germany. From 1957 to 1968, he was employed by the Central Intelligence Agency. He held key positions in the division of the agency that is responsible for covert intelligence gathering in foreign countries. In the course of his duties at the agency, Agee received training in clandestine operations, including the methods used to protect the identities of intelligence employees and sources of the United States overseas. He served in undercover assignments abroad and came to know many Government employees and other persons supplying information to the United States. The relationships of many of these people to our Government are highly confidential; many are still engaged in intelligence gathering.

In 1974, Agee called a press conference in London to announce his "campaign to fight the United States C.I.A. wherever it is operating." He declared his intent "to expose C.I.A. officers and agents and to take the measures necessary to drive them out of the countries where they are operating." Since 1974, Agee has, by his own assertion, devoted consistent effort to that program, and he has traveled extensively in other countries in order to carry it out. To identify C.I.A. personnel in a particular country, Agee goes to the target country and consults sources in local diplomatic circles whom he knows from his prior service in the United States Government. Agee and his collaborators have repeatedly and publicly identified individuals and organizations located in foreign countries as undercover C.I.A. agents, employees, or sources. The record reveals that the identifications divulge classified information, violate Agee's express contract not to make any public statements about agency matters without prior clearance by the agency, have prejudiced the ability of the United

States to obtain intelligence, and have been followed by episodes of violence against the persons and organizations identified.

In December 1979, the Secretary of State revoked Agee's passport and delivered an explanatory notice to Agee in West Germany. The notice states in part:

"The department's action is predicated upon a determination made by the Secretary under the provisions of (22 C.F.R.) Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."

Agee at once filed suit against the Secretary. He alleged that the regulation invoked by the Secretary, 22 C.F.R. Sec. 51.70(b)(4) (1980), has not been authorized by Congress and is invalid; that the regulation is impermissible overbroad; that the revocation prior to a hearing violated his Fifth Amendment right to procedural due process; and that the revocation violated a Fifth Amendment liberty interest in a right to travel and a First Amendment right to criticize Government policies. The district court held that the regulation exceeded the statutory powers of the Secretary under the Passport Act of 1926, granted summary judgment for Agee, and ordered the Secretary to restore his passport. A divided panel of the Court of Appeals affirmed.

The Passport Act does not in so many words confer upon the Secretary a power to revoke a passport. Nor, for that matter, does it expressly authorize denials of passport applications. Neither, however, does any statute expressly limit those powers. It is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes.

Particularly in light of the "broad rule-making authority granted in the (1926) Act," a consistent administrative construction of that statute must be followed by the courts "unless there are compelling indications that it is wrong."

This is especially so in the areas of foreign policy and national security, where Congressional silence is not to be equated with Congressional disapproval.

A passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and re-

The only means by which an American can lawfully leave the country or return to it — absent a Presidential granted exception — is with a passport. As a travel control document, a passport is both proof of identity and proof of allegiance to the United States.

The history of passport controls since the earliest days of the Republic shows Congressional recognition of Executive authority to withhold passports on the basis of substantial reasons of national security and foreign policy.

In 1966, the Secretary of State promulgated the regulations at issue in this case. 31 Fed. Reg. 13544, 22 C.F.R. Secs. 51.70(b)(4), 51.71(a) 1980. These provisions authorize revocation of a passport where "the Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."

Agee argues that the only way the Executive can establish implicit Congressional approval is by proof of longstanding and consistent enforcement of the claimed power: that is, by showing that many passports were revoked on national security and foreign policy grounds.

A necessary premise for Agee's contention is that there were frequent occasions for revocation and that the claimed Executive power was exercised in only a few of those cases. However, if there were no occasions — or few — to call the Secretary's authority into play, the absence of frequent instances of enforcement is wholly irrelevant. The exercise of a power emerges only in relation to a factual situation, and the continued validity of the power is not diluted simply because there is no need to use it.

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